BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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Petition to adopt, amend, or repeal a regulation pursuant to Pub. Util. Code § 1708.5.	Petition 22-01___ (Filed March 16, 2022)

PETITION OF UNION PACIFIC RAILROAD COMPANY FOR RULEMAKING TO REVISE THE METHODOLOGY FOR ALLOCATION OF THE FEES PROVIDED FOR IN PUBLIC UTILITIES CODE SECTION 421 AMONG CLASS I RAILROADS

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I. INTRODUCTION

Pursuant to Rule 6.3 of the California Public Utilities Commission's ("CPUC" or "Commission") Rules of Practice and Procedure and Public Utilities Code Section 1708.5, Union Pacific Railroad Company ("UP") hereby petitions the CPUC to open a rulemaking proceeding to repeal and/or amend Resolution SR-34, which adopted an allocation methodology for fees provided for in Public Utilities Code Section 421 for Class I Railroads 30 years ago. Despite signifcant changes that have occurred in the industry since SR-34 was adopted, the outdated methodology adopted in Resolution SR-34 remains in place today. Petitioner seeks this relief on the grounds that factual circumstances have changed materially since the CPUC initially adopted the fee allocation methodology and this methodology is no longer just and reasonable in light of these changes.

Resolution SR-34 was issued to adopt and implement an agreement between Class I Railroads, as they existed at the time, to allocate the CPUC fees assessed pursuant to Public Utilities Code Section 422. The resulting allocation is depicted below:

Southern Pacific	52.5%
Atchison, Topeka, & Santa Fe	28.5%
UP	18.5%
Burlington Northern	0.5%

While the allocation depicted above may have been reasonable three decades ago, since 1992 a number of railroad mergers have occurred and only two Class I Railroads remain operating in California: UP and Burlington Northern Santa Fe ("BNSF"). It is UP's understanding that the allocation methodology that was adopted in 1992 has never been reconsidered to determine whether it continues to be just and reasonable in light of these changes. Neither the CPUC nor the Class I Railroads themselves have updated the service fee allocation percentage following the mergers. In fact, no changes have been made to the 30-year-old initial allocation, but the circumstances have changed significantly since 1992.

Today, UP and BNSF each account for approximately 50% of gross Class I Railroad revenues in the state.[1] However, the two railroads pay a vastly different percentage of the total Class I Railroad CPUC fee: BNSF only pays 29% while UP pays 71%. UP submits that, where each of the two remaining Class I Railroad carriers each account for approximately 50% of state Class I Railroad revenues, it is manifestly unjust and unreasonable to allocate nearly ¾ of CPUC fees to one of these carriers and only about ¼ of the fees to the other.

Not only has the landscape of the operating railroads changed since 1992, the total annual fees assessed by the CPUC on Class I Railroads has also increased substantially.[2] This increase in fees has magnified the impact of the disproportionate fee allocation on UP and underscores the need for the Commission to update the allocation methodology to ensure that it is just and reasonable in light of the circumstances that exist *today*.

UP respectfully submits that the inconsistencies between gross revenue in the state and the existing CPUC fee allocation demonstrates that the allocation methodology adopted in 1992 to allocate fees collected from Class I Railroads pursuant to Public Utilities Code Section 422 is no longer just and reasonable. An allocation of CPUC fees based on gross revenues in the state would better reflect current business activity within the state, better reflect the proportionate cost of providing regulatory oversight to Class I Railroads, and better accommodate potential future changes within the industry.

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[1] *See* Annual Railroad Safety Report to the California State Legislature, dated November 30, 2021, for fiscal year 2020-2021, page 35.

[2] In only one year, from 2019 to 2020, the total CPUC fee assessed to Class 1 Railroads increased 13.7 percent. Cal. Pub. Util. Comm. Res. M-4840 (2020).

Allocation of fees on the basis of the gross in-state revenues of Class I Railroads would not require additional reporting or the management of additional data, as the CPUC already receives annual questionnaires disclosing the previous year's gross revenue in the state from each Class I Railroad.[3]

UP has discussed its concerns with BNSF in an attempt to reach agreement on an updated fee allocation methodology to reflect the current status of the railroad industry. Unfortunately, the parties' informal discussions failed to result in agreement. UP also engaged in discussions with the Commission about this request for rulemaking. In those discussions, UP made clear its desire to have a redetermination of the CPUC fee allocation between Class I Railroads on the basis that the current allocation percentage does not accurately reflect the Class I Railroads as they exist today. In response to this communication, the Commission acknowledged that the "two companies have met and conferred and have been unable to agree on whether or how to change the fee allocation percentages," and that "it appears formal commission action will be necessary to modify the agreement the CPUC adopted in 1992."[4] Indeed, the Commission recommended that one of the parties file a petition for rulemaking to open a formal proceeding.[5]

The CPUC has an obligation to establish regulations which allocate the fee in a just and reasonable manner and has the authority and obligation to update the allocation

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[3] *See* Class I Questionnaire – Railroad User Fee California Public Utilities Commission Safety & Enforcement Division Railroad Operations & Safety Branch, filed annually in March of each year.
[4] *See* Commission Letter dated October 18, 2021, attached as Exhibit A.
[5] *Id.*

methodology to ensure that it is just and reasonable under the circumstances that currently exist. UP is unaware of this issue being previously raised with the CPUC since the fee allocation methodology was established in 1992. A Commission review of the CPUC fee allocation methodology is clearly overdue.

For these reasons and as outlined in more detail below, UP respectfully submits this Petition and requests the CPUC initiate a rulemaking proceeding to evaluate and update the current CPUC fee allocation methodology based on the facts and circumstances that exist today. UP submits that the fees recovered pursuant to Public Utilities Code Section 422 should be allocated on the basis of gross revenue in the state to ensure that they are just, reasonable, and proportionate to the actual business activities of Class I Railroads in California.

II. THE CPUC FEE ALLOCATION METHODOLOGY DOES NOT REFLECT THE CURRENT CLASS I RAILROAD LANDSCAPE

In 1991, the state Legislature passed SB 152 to amend Public Utilities Code Section 422 and delete the exemption that previously existed for railroad corporations from the required payment of fees to cover the Commission's annual budget.[6] The amendment required the Commission to impose a fee on railroad corporations to finance that portion of the Commission's annual budget that is used to support the Commission's regulatory activities for the class from which the fee is collected.[7] Section 422 authorized railroad corporations to submit proposals concerning allocation plans to the CPUC before January

[6] S.B. 152 (Cal. 1992).
[7] Cal. Pub. Util. Code § 422(a).

15, 1992. If the railroad corporations submitted allocation proposals, Section 422 also required the CPUC to consider those proposals when it established regulations.[4]

In 1992, the CPUC adopted Resolution SR-34 which, among other things, accepted an allocation proposal from the Class I Railroads that existed at that time and set the percentage allocation of the total fees among Class I Railroad Corporations consistent with that proposal.[8] The proposal stated that Southern Pacific would pay 52.5%; Atchison, Topeka, & Santa Fe 28.5%; UP 18.5%; and Burlington Northern 0.5% of the total fee. At the time and under the circumstances that then existed, the then-existing Class I Railroads viewed this allocation as just and reasonable. However, since the adoption of Resolution SR-34, the number of Class I Railroad carriers and relevant circumstances facing Class I Railroads in California have changed dramatically. For example, in September 1996, roughly four years after the CPUC adopted the current fee allocation methodology, Southern Pacific Railroad and UP merged.[9] Three months later, BNSF Burlington Northern and Atchison, Topeka & Santa Fe Railway merged to create BNSF.[10] These mergers resulted in an allocation that was no longer proportionate to gross in-state revenues, but rather heavily skewed in BNSF's favor with UP allocated 71% of the total

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[8] Cal. Pub. Util. Comm. Res. SR-34 (1992).
[9] *Southern Pacific Railroad*, UNION PACIFIC, https://www.up.com/aboutup/special_trains/heritage/southern_pacific/index.htm#:~:text=The%20Southern%20Pacific%20merged%20with%20Union%20Pacific%20on,honor%20the%20men%20and%20women%20of%20the%20SP. (last visited Dec. 1, 2021).
[10] *BNSF Railway merger family tree*, TRAINS (June 2, 2006), https://www.trains.com/trn/railroads/history/bnsf-railway-merger-family-tree/#:~:text=BNSF%20Railway%20Company%20Burlington%20Northern%20Santa%20Fe%20Corp.,Name%20shortened%20to%20BNSF%20Railway%20Company%20in%202005.

fee and BNSF allocated only 29%, despite the fact that each is attributable for about 50% of the gross Class I Railroad revenues in California over a number of years.[11] Although the railroad mergers and other significant changes in the railroad industry over the last 30 years have fundamentally altered the basis of the initial CPUC fee allocation methodology, it has not been reviewed or reconsidered since established in 1992.

Public Utilities Code Section 422(h) requires that the Commission "shall establish regulations for allocating the proportionate share of the fee established pursuant to paragraph (2) of subdivision (a) to be paid by the rail corporations within that class." Additionally, Public Utilties Code Section 451 requires that all charges demanded upon any public utility for any service rendered shall be just and reasonable.[12] The just and reasonable standard set forth in Section 451 applies to the allocation of CPUC fees to UP and BNSF because they are common carriers.[13] Further, the Commission renders a service upon BNSF and UP through its safety enforcement activities. As such, all fees the Commission deamnds or receives from UP and or BNSF for the safety enforcement activities must be just and reasonable.[14] UP submits that it is unjust and unreasonable to allocate 71% of the total CPUC fee to UP and only 29% on that fee to BNSF when each accounts for about 50% of the gross Class I Railroad revenues in California.

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[11] *See* Annual Railroad Safety Report to the California State Legislature, dated November 30, 2021, for fiscal year 2020-2021, page 35.

[12] Cal. Pub. Util. Code § 451.

[13] *Compare* Cal. Pub. Util. Code § 216 (defining "public utility" to include "every common carrier") *with* Cal. Pub. Util. Code § 211 (defining "common carrier" to include "[e]very railroad corporation").

[14] Cal. Pub. Util. Code § 451.

Notably, since 1992, it is UP's understanding the CPUC has not reconsidered its Class I Railroad fee allocation methodology to determine whether it remains proportionate or just and reasonable in light of the significant changes that have occurred in the railroad industry over the past 30 years. What started as a methodology to allocate costs among four Class I Railroads is now being used to allocate costs between only two Class I Railroads, each of which enjoy approximately 50% of the gross Class I Railroad revenues in the state.[15] Although their gross revenues in the state are approximately equal, the 1992 fee allocation methodology continues to allocate 71% of these fees to UP and only 29% to BNSF. This is clearly not just and reasonable under the circumstances that exist today. While the Class I Railroads have changed substantially since the CPUC enacted the current fee allocation in 1992, the fee allocation methodology has not been reconsidered to ensure that it remains proportionate and just and reasonable under the current circumstances. By this metric alone, the fee allocation percentage is inherently outdated.

In addition to the Class I Railroads looking different, the actual fee assessed by the CPUC on the railroads is significantly higher today than it was thirty years ago. While the percentage allocation remains unchanged, the total fee assessed has greatly increased, magnifying the impact of the current disproportionate allocation of these fees on UP. In 2019, UP paid roughly \$8.3 million in fees and BNSF paid roughly \$3.39 million, for a

[15] *See* Annual Railroad Safety Report to the California State Legislature, dated November 30, 2021, for fiscal year 2020-2021, page 35.

total of nearly $12 million fees paid to the CPUC from the Class I Railroads. From 2012 to 2019 alone, the total fee assessed to Class I Railroads roughly doubled.[16] This increased financial impact underscores the need to grant this Petition so the Commission has an opportunity to update the underlying methodology, which was agreed to three decades ago by four railroads, two of which no longer exist.

III. PROPOSED ALLOCATION METHODOLOGY

The CPUC has the authority to engage in a rulemaking process to redetermine the railroad fee allocation between Class I Railroads as discussed above. UP submits that under circumstances in which only two Class I Railroads remain in operation and their gross in-state revenues are essentially equal, the methodology for allocation of CPUC fees should be based on the proportionate share of gross in-state revenues of each Class I Railroad. The impact of changes within the industry since the Commission first adopted the methodology, and the disproportionate allocation of CPUC fees that has since resulted, demonstrates why gross revenue in the state is the factor the Commission should use to determine how to allocate the budget for regulation activities among Class I Railroads. While the current allocation methodology may have made sense when it was adopted 30 years ago, subsequent changes have resulted in the inequitable outcome in which one railroad that enjoys 50% of the gross revenues from Class I Railroad service within California only pays 29% of the fees imposed to cover the costs of regulating the

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[16] *See* Annual Fee Statement for CPUC Transportation Reimbursement Account, Class I Railroad Corporations for the 2012-2019 years.

railroad industry within the state. A gross in-state revenue-based allocation would not only better reflect current business activity within the state, but it would also better accommodate potential changes within the industry, given that the Commission receives gross revenue data from the Class I railroads annually.

An updated fee allocation methodology based on gross California revenue would result in UP and BNSF both paying approximately 50% of the annual CPUC fee, proportionate to the actual gross revenue in the state for each Class I Railroad. In 2019, the total California gross revenue for Class I Railroads was $3.25 billion, with BNSF earning $1.54 billion and UP earning $1.71 billion.[17] An allocation based on percentage of gross revenue in the state would ensure each railroad contributes equitably to the costs associated with ongoing regulation of the industry.

Gross revenue in the state provides a tangible metric for the Commission to understand how much business both railroads are actually conducting in the state. The Commission uses the fees it assesses to conduct its safety and regulatory activities, and as such it makes sense for the fee allocation to correspond to the activities the Commission regulates.

Moreover, the Commission utilizes gross revenue in the state as a basis (subject to a cap) for allocation of fees among Class II and III Railroads operating in California.[18] This coupled with the fact that other states also utilize gross revenue in the state as a basis

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[17] *See* Annual Railroad Safety Report to the California State Legislature, dated November 30, 2021, for fiscal year 2020-2021, page 35.

[18] Cal. Pub. Util. Comm. Res. M-4853 (2021).

for fee allocation demonstrates gross revenue in the state is an equitable method to utilize.[19]

Public Utilities Code Section 422(h) requires the Commission to establish a "proportionate fee," and all charges approved by the CPUC must be just and reasonable.[20] Under this standard, neither company should be paying for costs incurred to provide regulatory oversight over the other's activities. The current allocation, however, requires UP to do just that: cover a significant portion of the costs incurred to regulate BNSF's activities. Basing the allocation fee on gross revenue in the state would result in a proportionate distribution of the fee as required under the relevant statutory framework.

IV. CONCLUSION

Pursuant to Rule 6.3 of the CPUC's Rules of Practice and Procedure and Public Utilities Code Section 1708.5, UP respectfully submits this Petition for rulemaking and requests the Commission institute a rulemaking proceeding to consider amending the outdated railroad fee allocation to reflect the changes in the last thirty years that have dramatically altered the Class I Railroad landscape to create a proportionate allocation percentage. UP proposes that the Commission base the new fee allocation on percentage of gross revenue in the state to ensure that the allocation is equitable, proportionate, and able to accommodate future changes that could occur within the industry.

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[19] *See* Or. Rev. Stat. § 824.100; *see also* Wash. Admin. Code § 480-62-300(4).
[20] *See* Cal. Pub. Util. Code §§ 422(h), 451.

Respectfully submitted,

/s/ Madeline Orlando

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PROPOSED ADOPTED RULE

The fees recovered pursuant to Public Utilities Code Section 422 shall be allocated on the basis of gross revenue in the state to ensure that they are just, reasonable, and proportionate to each Class I Railroad carrier's business activities within the state of California.

VERIFICATION

I, Bryan Clark, am authorized to make this verification on behalf of Union Pacific Railroad Company. I declare under penalty of perjury under the laws of the State of California that the factual assertions in the foregoing ***Petition of Union Pacific Railroad Company for Rulemaking to Revise the Methodology for Allocation of the Fees Provided for in Public Utilities Code Section 421 Among Class I Railroads*** are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters, I believe them to be true.

Executed on March 15, 2022 at Omaha, Nebraska.

Bryan Clark

Bryan Clark

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Petition to adopt, amend, or repeal a regulation pursuant to Pub. Util. Code § 1708.5.	Petition 22-01____ (Filed March _16_, 2022)

CERTIFICATE OF SERVICE RE PETITION OF UNION PACIFIC RAILROAD COMPANY FOR RULEMAKING TO REVISE THE METHODOLOGY FOR ALLOCATION OF THE FEES PROVIDED FOR IN PUBLIC UTILITIES CODE SECTION 421 AMONG CLASS I RAILROADS

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the **PETITION OF UNION PACIFIC RAILROAD COMPANY FOR RULEMAKING TO REVISE THE METHODOLOGY FOR ALLOCATION OF THE FEES PROVIDED FOR IN PUBLIC UTILITIES CODE SECTION 421 AMONG CLASS I RAILROADS** on all parties of record in this proceeding, by serving an electronic copy on their email addresses of record or by mailing a properly addressed copy by first-class mail with postage prepaid to each party for whom an email address is not available, and on the Executive Director, Chief Administrative Law Judge, Energy Division Director, and Public Advisor, as follows:

Executive Director Rachel Peterson: Rachel.peterson@cpuc.ca.gov
Chief ALJ Anne Simon: anne.simon@cpuc.ca.gov
Director of Rail Safety Roger Clugston: roger.clugston@cpuc.ca.gov
Public Advisor's Office: public.advisor@cpuc.ca.gov

BNSF Railway: 330 N Brand Boulevard, Suite 700, Glendale, CA 91203 (via U.S. Mail)

Executed on March 16, 2022, at Sacramento, California.

Diana Bonilla

Diana Bonilla

EXHIBIT A

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 18, 2021

Josephine Jordan, Counsel
Union Pacific Railroad
1400 Douglass Street
Omaha, Nebraska 68179

SUBJECT: Response to Union Pacific Letter Dated September 29, 2021, Regarding the CPUC User Fee Allocation for Class 1 Railroad Corporations

Ms. Jordan:

Thank you for your letter and please accept my apologies for the delayed response.

In reviewing your request, we referred to California Public Utilities Code, Section 422(h), which states, "The commission shall establish regulations for allocating the proportionate share of the fee established pursuant to paragraph (2) of subdivision (a) to be paid by the rail corporations within that class. The regulations may utilize gross intrastate revenues; track mileage within the state; terminals located within the state; loaded car miles traveled within the state; fuel consumption; or any other measure deemed by the commission to be appropriate in allocating the fee among railroad corporations. On or before January 15, 1992, railroad corporations as a group may submit a proposed plan of allocation to the commission, which the commission shall consider in establishing the regulations."

In 1992, the California Public Utilities Commission (CPUC) adopted Resolution SR-34, which, among other things, adopted the agreement Class I Railroad Corporations reached for the percentage allocation of the total fees among themselves as the basis for the distribution of the fee, rather than a formula derived by the CPUC. From 1992 until now, the CPUC has followed the percentage allocation agreed upon by the railroad corporations. We understand that there have been various acquisitions and mergers that occurred since Resolution SR-34 was adopted. In response to an inquiry from your company, Union Pacific, in February 2021, the CPUC recommended that all railroad corporations meet, confer, and come up with a new allocation approach for the CPUC to review identifying either (a) the new proposed consensus allocation approach or (b) each entity's proposed approach if no consensus is reached.

We have received responses from your company, Union Pacific, which would like the percentage allocation to be based on gross intrastate revenues, and from Burlington Northern Santa Fe, which asserts that the current percentage allocation is equitable based on current infrastructure and activity level. Given that the two companies have met and conferred and have been unable to agree on whether or how to change the fee allocation percentages, it appears formal commission action will be necessary to modify the agreement the CPUC adopted in 1992. Considering how much time has elapsed since that adoption -- almost 30 years, it seems appropriate for the CPUC to examine which methodology is appropriate. Accordingly, we recommend that one of the corporations file a petition for rulemaking to open a formal proceeding.

Sincerely,

Ryan O. Dulin

Ryan Dulin
Deputy Executive Director, Internal Operations

CC: Maryam Ebke, Deputy Executive Director, Safety and Consumer Protection
Roger Clugston, Director, Rail Safety Division